IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.94 OF 2003

Mr.Chandrakant Ganesh Mhatre .. Applicant

versus

Ganpat Gayaram Kajbaje .. Respondent

...

Mr.G.S. Joshi for the applicant.

Mr.K.K. Malpathak for the respondent.

**CORAM : D.G. KARNIK, J**

**DATED : 14th September 2006.**

**P.C:-**

1. Heard counsel.

2. This Civil revision application is directed against the order dated 10th December 2002 passed by the 4th Addl. District Judge, Thane condoning the delay of 183 days in preferring the appeal.

3. The respondent filed a suit bearing RCS no. 645 of 2001 in the Court of Civil Judge, Jr. Division, Thane for possession. The suit summons could not be served on the appellant in the normal course. However, it was served on the appellant by publication in the newspaper. The suit thereafter was heard ex-parte and was decreed. The respondent filed Execution Petition bearing Darkhast no.77 of 2002 for execution of the decree. Appellant came to know about the ex parte decree when the warrant of possession was issued Immediately thereafter the appellant filed an appeal against ex-parte decree accompanied by an application for condonation of delay. Vide order dated 10th December 2002, the appellate court condoned the delay in filing the appeal. That order is impugned in this revision application.

4. Learned counsel for the applicant submitted that contention of the respondent that he was not aware of the decree passed against him and therefore, could not file appeal in time was incorrect. He submitted that publication of summons by public notice was a good service and therefore, the appellant must be deemed to have had knowledge of of the suit as also passing of the decree. Therefore, counsel submitted, that there

was no sufficient cause to condone the delay. In support the learned counsel referred to and relied upon the decision of the Supreme Court in Basant Singh & Anr. Vs. Roman Catholic Mission reported in (2002) 7 SCC 531. That decision has no application to the facts of this case. In that case only question before the Supreme Court for consideration was whether the service of notice by RPAD with acknowledgement card was valid in terms of Order 5 Rule 19A of the Code of Civil Procedure, (for short the C.P.C.) read with section 27 of the General Clauses Act. In the facts and circumstances of the case it was held that the notice was validly served. The Supreme Court further held that under Order 9 Rule 13 of the C.P.C. the decree cannot be set aside merely on the ground that there was irregularity in the service of summons. We are not concerned in this case whether decree should be set aside under Order 9 Rule 13 of the C.P.C. The issue before the court was whether there was sufficient cause for condonation of delay. On appreciation of evidence the court has held that the respondent had made out sufficient cause for condonation of delay. The finding that the respondent had sufficient cause and had explained the delay is a finding of fact. In my view, that finding is possible

finding of fact which is based on appreciation of evidence and cannot in any way be said to be perverse. Correctness of the said finding, in the absence of any perversity cannot be questioned in a revision under section 115 of the C.P.C.

5. Section 115 of the Code of the C.P.C. enables this court to set aside a judgement if the lower court exercises the jurisdiction not vested in it or refuses to exercise the jurisdiction vested in it or acts with material irregularity in exercise of its jurisdiction. Neither of the things are shown to exist. In the circumstances, there is no merit in the revision. It is accordingly dismissed with no order as to costs.

6. Learned counsel for the petitioner prays for stay of this order. No executable order passed. Hence the request for the stay of the order is rejected.

(D.G. KARNIK, J.)